

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the)
Commission's own motion into the)
Operations and practices of Bidwell)
Water Company and its Owners and)
Operators, Thomas and Vicki Jernigan,)
and Order to Show Cause why findings)
should not be entered by the Commission)
under Public Utilities Code Section 855.)
_____)

FILED
PUBLIC UTILITIES COMMISSION
OCTOBER 2, 2001
SAN FRANCISCO OFFICE
I.01-10-002

**ORDER INSTITUTING INVESTIGATION
AND TO SHOW CAUSE**

I. INTRODUCTION

The Commission's Legal Division has learned, as supported in the Declaration of Monique Steele, attached hereto, that Respondents Bidwell Water Company, Inc. (Bidwell), and Thomas and Vicki Jernigan (the Jernigans) are unwilling or unable to adequately serve Bidwell's ratepayers, and have been unresponsive to Commission orders. The Legal Division also believes that Respondents contemplate abandoning the water system serving Respondents' customers. The purpose of this proceeding is to allow the Respondents to show cause why the Commission should not make findings under Public Utilities Code § 855.¹

¹ Unless otherwise noted, all statutory references herein are to the California Public Utilities Code.

Section 855 provides:

Whenever the commission determines, after notice and hearing, that any water or sewer system corporation is unable or unwilling to adequately serve its ratepayers or has been actually or effectively abandoned by its owners, or is unresponsive to the rules or orders of the commission, the commission may petition the superior court for the county within which the corporation has its principal office or place of business for the appointment of a receiver to assume possession of the property and to operate its system upon such terms and conditions as the court shall prescribe. The court may require, as a condition to the appointment of such receiver, that a sufficient bond be given by the receiver and conditioned upon compliance with the orders of the court and the commission, and the protection of all property rights involved. The court shall provide for disposition of the facilities and system in like manner as any other receivership proceeding in this state.

As required by this statute, we have scheduled a hearing at the California Public Utilities Commission, at 505 Van Ness Avenue, San Francisco, CA 94102, at 9:30 a.m. on October 30, 2001.

Attached to this order is a declaration by Commission counsel Monique Steele, documenting the long history of proceedings at the Commission against Bidwell Water Company. The previous proceedings have revolved around the Commission's efforts to make Bidwell Water Company's Safe Drinking Water Bond Act (SDWBA) account whole. The SDWBA provides for loans to privately-held water companies, for the purpose of ensuring that the water they provide to their customers is safe to drink.

The Commission found that the Jernigans diverted funds from customers. These funds were collected in the form of a surcharge, designated for repayment of the SDWBA loan. Instead of depositing the funds into the trust account specifically set up for those funds, the Jernigans apparently used the funds

for undetermined purposes. The underlying decisions, D.98-10-025 and its modification, D.99-04-028, were issued in I.97-04-013 and are final. All appeals from these decisions have been exhausted. Efforts by the Commission to enforce its orders continue. The order to show cause issued today is necessary to allow the Commission the option to proceed under section 855 for the protection of Bidwell's ratepayers.

II. BACKGROUND

Since 1980, all of Bidwell's ratepayers have been paying for a Safe Drinking Water Bond Act (SDWBA) loan through a surcharge on their bills. However, Bidwell and the Jernigans have failed to deposit all of the collected surcharge into the designated surcharge account, and have instead used a portion for other undetermined expenses. The Commission's investigation into this matter, (I. 97-04-013, attached as exhibit 1 to the Declaration of Monique Steele) concluded that this failure had continued for over 15 years, in violation of Commission Decision 90714 (attached as exhibit 2 to the Declaration of Monique Steele). Commission Decision (D.) 98-10-025 (attached as exhibit 3 to the Declaration of Monique Steele), issued on October 8, 1998, ordered Bidwell to credit the SDWBA account with all past surcharge collections plus interest (D. 98-10-025, Ordering Paragraph 2). Specifically, D.98-10-025 ordered Bidwell to credit the SDWBA account with \$22,000 per year over the estimated SDWBA surcharge collections (Id., Ordering Paragraph 3), and to adjust the SDWBA surcharge to produce \$20,000 per year until the full credit is accomplished (D.99-04-028, attached as exhibit 4 to the Declaration of Monique Steele, Ordering Paragraph 2.)

The Commission further ordered Bidwell to file an advice letter implementing the order within 60 days of the effective date of the decision, October 8, 1998. (D.98-10-025, Ordering Paragraph 1.) Bidwell failed to comply

with any of these ordering paragraphs. Respondents have exhausted all of their legal remedies; thus, D.98-10-025, as modified by D.99-04-028, is final.

On November 9, 2000, the Commission sent a letter (attached as exhibit 5 to the Declaration of Monique Steele) to Bidwell Water Company, demanding compliance with the Commission's orders as set forth in D.98-10-025 as modified by D.99-04-028. The letter was sent by certified mail, and receipt was confirmed by U.S. Postal Service Form 3811, attached as Exhibit 6 to the Declaration of Monique Steele. When Respondents failed to respond in the time set forth in that letter, the Commission, on its own motion, issued Resolution (Res.) W-4243 (attached as exhibit 7 to the Declaration of Monique Steele), changing Bidwell's tariff to reflect a decrease in the surcharge for repayment of the SDWBA loan. Res. W-4243 reduced the surcharge so that the amount to be collected by Bidwell Water Company was consistent with the amount set forth in D.98-10-025 as modified by D.99-04-028. Bidwell filed an application for rehearing of Res.W-4243, and the application was denied on February 23, 2001 in D.01-02-079, attached as Exhibit 8 to the Declaration of Monique Steele. After this denial, Bidwell reduced its surcharge in accordance with Res. W-4243. However, the utility has made none of the ordered annual repayment installments (set by the Commission at \$22,000 each) to the trust account for repayment of the loan.

On March 15, 2001, Tom Jernigan left a voicemail message for Commission counsel threatening to shut down Bidwell Water Company. (A transcript of the relevant portion of the voicemail message is attached as Exhibit 9 to the declaration of Monique Steele). The Commission sent a letter dated March 16, 2001 to Bidwell's counsel, Neal Costanzo, inquiring about Tom Jernigan's intent to shut down Bidwell Water Company. (Letter to Bidwell counsel is attached as Exhibit 10 to the declaration of Monique Steele).

Mr. Costanzo responded by letter on March 20, 2001 and confirmed that Tom Jernigan does want to shut down Bidwell Water Company. (Letter from Bidwell counsel is attached as Exhibit 11 to the declaration of Monique Steele). On May 29, 2001, Frank Brommenschenkel, a consultant to Bidwell Water Company, informed the Commission via email that bankruptcy proceedings will be started soon. (Copy of email attached as Exhibit 12 to the declaration of Monique Steele.)

III. DISCUSSION

The facts in this matter with respect to non-compliance are settled. The Commission's orders in D.98-10-025, as modified by D.99-04-028 in I. 97-04-013, have been final for more than two years. The exhibits to the declaration of Monique Steele demonstrate that Respondents have not complied timely with the Commission's orders, when they have complied at all. The only remaining issue is whether, given Respondents' failure to comply with these Commission orders, Respondents can show good cause why the Commission should not proceed to pursue its remedies under § 855.

Commission decisions are formal orders of the Commission, and, under §702:

Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

The conduct of the utility's management, Thomas and Vicki Jernigan, illustrates a regrettable refusal to comply with Commission orders entered to protect the ratepayers. Bidwell's alleged financial inability to comply with these orders, and to repay the trust account, is not an issue, because the Commission took Bidwell's financial condition into account in making its orders in D.98-10-025 as modified by D.99-04-028.

Further, Commission auditors conducted a thorough audit of Bidwell's financial condition, and found that Bidwell has sufficient funds to operate its utility, maintain and repair its facilities, and return the missing funds to the SDWBA trust account. However, the audit also found that Bidwell's current management is incapable of managing the utility, or of operating it at a reasonable cost. (Audit report attached as Exhibit 13 to the Declaration of Monique Steele.)

Under § 701, this Commission is "empowered to supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (See also Cal. Const., Art. 12, § 6.) In the case of utilities serving in competitive markets, the Commission can revoke a certificate of public convenience and necessity (CPCN) and require the problematic entity to cease utility operations. However, in the case of a water company, that remedy would leave the innocent captive customers, dependent on water service as a basic need of life, in an untenable situation. Hence, § 855 provides one course of action that this Commission can elect to ensure that basic orders of the Commission are followed and the public convenience and necessity are served.

An order to show cause has been described as "in the nature of a citation to a party to appear at a stated time and place to show cause why the requested relief should not be granted." (*Difani v. Riverside County Oil Co.* (1927) 201 Cal.210, 213-214; 6 Witkin, Cal Proc. (4th ed. 1997) Proceedings Without Trial, § 55, at 454.) In an order to show cause proceeding, the burden is on the respondent to show good cause why the proposed legal action should not go forward. Here, the action in question is a petition to superior court under § 855 for the appointment of a receiver to assume possession of Bidwell Water Company's property and to operate its system. Unless Respondents can show good cause why

the Commission should not file such a petition, due process requires no hearing before the Commission, as a full hearing may be had in superior court.

The Declaration of Monique Steele illustrates the factual history of this agency's efforts to secure compliance, thereby demonstrating good cause why the Commission should petition the Superior Court of Plumas County for a receiver for Bidwell Water Company. Under § 855, Bidwell Water Company is entitled to notice and a full hearing in superior court, in which it will receive an opportunity to provide evidence to counter that contained in the supporting declarations hereto, sufficient to show why a receiver should not be appointed under § 855. Therefore, Bidwell Water Company is ordered to appear before this Commission at the date and time set, and show cause why the Commission should not find that it is unable to serve its customers adequately, and petition the superior court under § 855 for Bidwell's failure to comply with the Commission's orders as set forth in D.98-10-025, as modified by D.99-04-028, and in Res. W-4243.

IT IS ORDERED that:

1. Bidwell Water Company, a corporation, and its President and sole shareholders, Thomas Jernigan and Vicki Jernigan, are named as Respondents herein, and are hereby afforded an opportunity to show cause on October 30, 2001 at 9:30 a.m. before the Commission why the agency should not enter findings that their conduct falls into one or more of the following categories:

- a. Bidwell Water Company is unable or unwilling to adequately serve its ratepayers;
- b. That Bidwell Water Company has been actually or effectively abandoned by its owners; or
- c. That Bidwell Water Company is unresponsive to the rules or orders of the Commission.

2. The underlying facts in the effort to enforce D.98-10-025 as modified by D.99-04-028 are settled, and appeals on the merits have been denied. The

Respondents have not been responsive to Commission orders. Thus, this proceeding is limited to the question of whether the Respondents can show that their operational and financial conduct and pattern of non-compliance, separately or taken together, do not fall into one or more of the categories listed in Ordering Paragraph 1, above.

3. This ordering paragraph suffices as the “preliminary scoping memo” required by rule 6 (c) of the Commission’s Rules of Practice and Procedure. This proceeding is categorized as a ratesetting proceeding and is set for hearing solely on the order to show cause. This matter is not an enforcement proceeding, as Respondents will not be made subject hereby to fines or other enforcement penalties imposed by the Commission. Its purpose and effect are thus limited to determining whether the next step should be pursued in the statutorily designated court. The issues to be resolved in this proceeding are framed in the preceding ordering paragraphs, and are limited to the question of whether good cause can be shown why the Commission should not petition the superior court under § 855. This order, as to categorization of this proceeding, is appealable under the procedures in Rule 6.4. Any person filing a response to this Order Instituting Investigation shall state in the response any objections to the Order regarding the need for hearings, issues to be considered, or proposed schedule. However, objections must be confined to jurisdictional issues which could nullify any eventual decision on the merits, and not on factual assertions which are the subject of the hearing. The proceeding may be expedited as an emergency matter in order to protect Bidwell’s ratepayers.

4. The Executive Director shall cause personal service of this Order to be made on Bidwell Water Company either by delivering a copy to Tom Jernigan or by leaving a copy of the Order during usual office hours in Bidwell’s office at 400 Main Street, Greenville, CA 95947, with the person who is apparently in charge thereof, and by thereafter mailing a copy of the Order (by first class mail, postage

prepaid) to Bidwell Water Company at the place where the copy of the Order was left. Service of the Order in this manner is deemed complete on the 5th day after mailing. This Order will also be mailed to Bidwell's counsel, Neal Costanzo, Hargrove and Costanzo, 6495 North Palm Avenue, Suite 101, Fresno, CA 93704.

This order is effective today.

Dated October 2, 2001, at San Francisco, California.

LORETTA M. LYNCH

President

RICHARD A. BILAS

HENRY M. DUQUE

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners